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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1028

SCM CORPORATION, *Petitioner*,

—against—

ADVANCE BUSINESS SYSTEMS & SUPPLY COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRELIMINARY STATEMENT

This brief in opposition to the petition for writ of certiorari is submitted in behalf of the respondent, Advance Business Systems & Supply Company, the successful plaintiff in this private antitrust action for damages and injunctive relief instituted in December, 1966.

OPINIONS BELOW

The principal and supplementary opinions of the United States District Court for the District of Maryland (Thomsen, C.J.) granting plaintiff a judgment of damages in the

amount of $50,142 and of limited injunctive relief are reported at 287 F. Supp. 143 (App. 1a-41a).

The Final Judgment of the District Court, though caricatured throughout the Petition for Certiorari (see, e.g. pages 4, 5, 6, 13, 14, 19), and though expressly affirmed by the Court of Appeals (App. 52a, 68a), is not reprinted in the Petition for Certiorari or Appendix thereto.[1]

The District Court also rendered extensive Findings of Fact pursuant to Federal Rule of Civil Procedure 52, to which it expressly referred in its opinion (App. 2a), and from which the Petition for Certiorari quotes. (Petition for Certiorari, pages 6 and 14). These Findings of Fact[2] are not printed.

The Opinion of the Court of Appeals (per Sobeloff, J.) affirming the judgment of the District Court and directing the award of additional damages by the District Court is reported at 415 F. 2d 55 (App. 43a). The subsequent *pro forma* order of the Court of Appeals denying SCM's Petition for Rehearing is printed at page 69 of Petitioner's Appendix.[3]

JURISDICTION

Petitioners allege that this Court has jurisdiction by virtue of 28 U.S.C. Section 1254(1).[4] Respondents assert that, by reason of noncompliance with Supreme Court Rules 23(1)(j) and 23(4), the Petition has not been timely perfected.

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[1] The Final Judgment appears at R. 601 and is printed as an appendix hereto, as is an additional judgment based on the Court of Appeals' decision subsequently entered by the District Court pursuant to a stipulation as to the amount of damages.

[2] R. 357-555.

[3] The instant Petition was filed on the eighty-ninth day following denial of the Petition for Rehearing.

[4] The parties are in agreement that the District Court had jurisdiction under 28 U.S.C. Section 1337.

QUESTIONS PRESENTED

1. Is a Petition for Certiorari which is unaccompanied both by the Final Judgment of the District Court and by the Findings of Fact quoted by Petitioners and entered by the trial court pursuant to Rule 52 of the Federal Rules of Civil Procedure, properly perfected under Rules 23(1)(j) and 23(4) of the Rules of this Court?

2. Is it appropriate, in light of the well-established 'two court' rule, for this Court to review the considered findings of illegal tying purpose made by both the District Court and Court of Appeals with respect to the agreements at issue where the Petitioner has not challenged on appeal the District Court's findings and decree with respect to accompanying illegal tying practices of 'deliberate and dishonest * * * misrepresentation and sabotage' and misuse of rental and service agreements?

STATEMENT

SCM. SCM, the defendant below, is today one of the large manufacturers of copying machines and supplies (R. 502 and App. 44-45a).[5]

SCM began marketing its copying machines in July of 1962; it was one of the earliest machine marketers (App. 4a, 7a). SCM also markets supplies (paper and toner) for its machines. It only sells its supplies for use in its own machines; no attempt is made to sell supplies for use in other machines. The recurring revenues and profits from supplies far exceed the revenues and profits from the sale of machines (R. 372 and App. 5a, 44a). SCM marketing officials recognize that most customer purchases of supplies in a single year will amount to two or three times

[5] The record references (R.) are to the Findings of Fact of the District Court.

the amortized value of the machine. (Transcript at 2400, testimony of Robert Sachs.)

Advance. Advance, the plaintiff, below, is a small Maryland corporation dealing in office equipment and supplies, primarily in the Baltimore metropolitan area. It is a dealer in Nashua Corporation products. Nashua electrostatic copying supplies, which were designed for use in SCM machines, are its principal products. (App. 2a, 43a and R. 357).

Advance is entirely owned by Alan I. Elkin and his wife, Lois Elkin. Mr. Elkin is the president, general manager and dominant figure of the business (R. 357). Mr. Elkin is an experienced sales manager for office equipment. With a staff of only two or three persons (Pl. Ex. 33), he diligently and resourcefully sought to compete in the sale of supplies for use in SCM machines. (App. 24a).

Paper and Supplies for Use in SCM Machines. Since it entered the copying industry in 1962, SCM has marketed paper and supplies only for use in its own machines. Several companies have attempted to compete with SCM in the sale of paper for use in SCM machines. The only significant competitors have been Standard Office Systems (S.O.S.) and Nashua. S.O.S. ceased to be an active competitor in early 1965. Since 1965, Nashua and its dealers have been the only significant competitors of SCM in the sale of copying paper for use in SCM machines (R. 367). In Maryland, Nashua (through Advance) constituted 90% of SCM's competition (App. 45a).

The production of electrostatic paper is intricate and requires a high degree of technology (R. 363). Nashua is one of the largest coaters and producers of specialty papers. By late 1964, Nashua developed and marketed an electrostatic copying paper for use on SCM machines which pro-

duced significantly better contrast than SCM paper (R. 363-64 and App. 6a). Nashua also began using a superior paper cutting device, which SCM later insisted that its supplier use (R. 366). The court found that Nashua paper "has always been at least as suitable as SCM paper for use in SCM machines, and often has been better for many purposes than SCM paper" (App. 6a). SCM extensively tested Nashua paper. SCM's test data showed Nashua to be equal, or superior, to its own paper (R. 365).

For almost a year, from July, 1965 to June, 1966, SCM purchased large quantities of Nashua electrostatic copying paper and marketed it under the SCM label in Canada. No complaints were received from the field concerning the Nashua paper marketed by SCM in Canada (R. 363-64 and App. 6a).

When, in 1962, SCM began marketing electrostatic copying paper, it had no paper technology; it purchased its paper from suppliers. In 1962, SCM entered a contract requiring it to purchase all its paper requirements from Plastic Coatings Corporation (Plastic Coatings) until July, 1965 (R. 363).

The record is replete with evidence of the following facts: that SCM had continuing and sometimes substantial difficulties with the Plastic Coatings paper it marketed from 1962 to late 1965 (R. 363), that Nashua began marketing a better-contrast, better cut, electrostatic paper in December of 1964 (App. 6a, R. 364-67), and that the competitive situation reached crisis proportions in 1965, when SCM's field managers from all corners of the country regularly reported that they were losing supply accounts because Nashua and its dealers offered better-quality paper at lower prices (R. 428-34).

SCM's Restrictive Practices. The trial of this case centered upon Advance's claims that SCM had deliberately

implemented a series of practices to restrict competition in the sale of supplies for use in SCM machines and to coerce customers to use only SCM's (sometimes inferior) paper in the machines. No less than eight such restrictive practices were proved. In most cases the practices were approved by, and the program implemented from, the highest echelon of SCM management.

SCM management first became aware of significant competition for the sale of supplies for use in SCM machines (from S.O.S. and Brüning) in early 1964 (R. 373). The District Court expressly found that immediately afterward, in the first three months of 1964, four restrictive practices were instituted by SCM (App. 7a, R. 373-74).

1. *SCM Policy of Tying Replenisher to Paper.* In 1964, and the first few months of 1965, SCM was the sole source of replenisher (a carbon-like solution, necessary to form an image on the paper) for use in SCM machines (App. 8a, R. 377). In 1963, before competition in the sale of supplies appeared, SCM sold separate cartridges of replenisher at a price of $1.75 per cartridge (App. 8a, R. 375-76). Thereafter, beginning in February of 1964 when competition appeared, it refused to sell replenisher separately from its paper (App. 8a, R. 374-75). Later in 1964, it recanted and offered to sell replenisher separately, but at an exorbitant price of $45.00 per cartridge (App. 8a, R. 375). The court found that the replenisher policies were deliberately implemented to make it impossible for competitive papers to be sold for use in SCM machines (App. 8a, R. 374-75).

2. *Restriction of Sale of Machines.* SCM does not sell, or permit its dealers to sell, its machines to competing paper merchants. Since early 1964, that policy has been vigorously enforced (App. 8a, R. 383). The purpose of this policy is to restrict competitive supply dealers (paper

sales are so significantly more profitable than machine sales that competitors were willing to loan or cheaply rent machines in order to get the paper business) (App. 8a, R. 387) and this policy has restrained Advance from competing effectively for the supply business of customers who desired to rent SCM machines (App. 8a, R. 388).

3. *Restrictions on Sale of Repair Parts.* SCM purchases machine parts from independent suppliers on the condition that the suppliers sell parts only to SCM (App. 57). Beginning in late 1963, SCM restricted sales of repair parts to competitive paper dealers for the purpose of restricting their ability to offer service to their customers (App. 8a-9a, R. 390-96).

4. *SCM's Use of Service Agreement as a Device to Control Supply Sales.* Since it entered the copying industry, SCM had made available to SCM machine users a service agreement (a contract under which service is provided for one year at a flat-rate). Simultaneously with the advent of competition in 1963, SCM added a competitive supplies clause stating that its service agreement "shall not apply to any repairs made necessary by the use of [supplies] made by other than SCM and not approved by SCM" (App. 9a, R. 397). The clause was added at the insistence of the *sales* department; SCM's service department did not know whether competitive supplies would cause service problems (R. 398). A memorandum from the National Sales Manager to the National Service Manager dated October 28, 1963, read as follows:

> "At the present time we are renewing certain maintenance agreements which were issued prior to the insertion of the clause which restricted our service liability to those units using SCM supplies.
>
> While there are not many of them, these old service agreements must not be renewed and in their place

a new agreement must be written containing the proper clause.

There are two reasons for doing this. First, we must establish a principle that is uniform in providing service should competitive supplies be involved and make sure that this principle is maintained. Secondly, we should make the sales department feel that we are cooperating with what weapons we have in terms of a service activity to discourage competitive activity in the paper supply area.

Will you please follow through and see that a bulletin is issued as soon as possible." (R. 398).

The clause is directed against the use of supplies "not approved by SCM for use in SCM machines". SCM has never approved any paper other than its own, for use in SCM machines (R. 400). SCM has never published its paper specifications; they are revealed only to SCM's own paper suppliers (R. 401).

In late 1964, SCM also added a "termination clause", reserving the right to suspend the service agreement "as to any machine in which other supplier's paper or other supplies have been used" (App. 10a, 56a). National officers of SCM instructed personnel to tell customers that SCM cancels the service agreement when a user begins using competitive paper (R. 402-03).

The courts below specifically found that "the competitive supplies clauses, authorized by SCM's national sales department, were designed to be used as a lever to coerce customers to use only SCM supplies. The service agreement was actively and intentionally used for that purpose by field personnel" (App. 9a-11a, 22a-23a, 54a-64a).

When Advance began dealing in Nashua copying paper in December of 1964, it did not intend to service SCM

machines. As soon as Advance sold paper to customers for use in their SCM machines, the customers were threatened with cancellation of their SCM service agreements (R. 405). Mr. Elkin complained to the local SCM branch manager about the threats of cancellation. When, by early March of 1965, SCM continued to threaten the cancellation of service agreements of customers who purchased paper from Advance, Advance was forced to establish a service facility and offer free service to its customers in order to protect its electrostatic business (R. 406, 484, App. 24a).

Later, four additional restrictive practices were introduced:

a. *SCM's Threats of Rental Termination Where Competitive Supplies Were Used.* SCM has rented its smaller machines (Model 33 and 44) to some customers. The District Court and Court of Appeals specifically found that from at least as early as August, 1965 to the date of trial, it was SCM's policy to threaten the cancellation of rental agreements of customers who used competitive supplies. This policy was communicated to SCM machine lessees, including customers of Advance (App. 11a, 21a-22a, 52a-55a).[6]

b. *Tie-In of SCM Supplies to its Model 55 Machine.* From its entry into the industry in 1962, until 1966, SCM had marketed its machines and its paper (supplies) as separate commodities.

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[6] Both the District Court and Court of Appeals found the rental agreement clause "itself not unreasonable" but found an illegal tying condition from the course of conduct supplementing it. (App. 53a). Notwithstanding this, Petitioner makes a point of printing the agreement in its Appendix (App. 77a) in close proximity to the Model 55 copy service agreement. It must be stressed that the Courts below found a rental agreement had never been offered to private users in connection with the Model 55 (App. 11a, 12a, 20a, 48a-49a).

Unlike its marketing of the earlier low-volume models, when SCM introduced its high-volume Model 55 machine early in 1966, it marketed it only under a copy service agreement. The copy service agreement (App. 73a) provides a monthly charge based on the number of meter clicks (copies made) on the machine during the month. The machine rental, supplies, and service are all included under the single meter charge. Since the charge for the machine includes the cost of supplies, the copy service only program was found by both courts below to have the effect of completely excluding competition for the sale of supplies for use in the Model 55 (App. 11a-12a, 48a).

From its introduction in early 1966 until March of 1967, the Model 55 was made available only on a copy service basis. During that period, competing paper sellers were completely foreclosed from sales for use in the Model 55. In 1966 alone, this foreclosed market amounted to 20% of SCM's total paper sales (i.e., 200 million sheets of paper) (R. 413 and App. 51a). The Court of Appeals noted that "the aggregate revenue from this source was $7,000,000." (App. 51a).

SCM began marketing the Model 55 under copy service only. The General Services Administration (GSA), acting upon complaints, issued a series of orders preventing awards of GSA contracts on a basis, such as SCM's copy service only basis, which tied together the machine and supplies. In March of 1967, SCM offered the 55 on alternative plans (for sale, and for rent without supplies) to government users. SCM offered the alternative plans only because a series of GSA decisions compelled it to do so or lose the government's business (R. 411-12, App. 12a).

SCM also began to offer the Model 55 for sale to commercial (non-government) users in March of 1967. It has

never offered the 55 to commercial users on a rental basis (without supplies) (R. 412, App. 48a-49a). As recently as the date of trial, SCM had only sold 110 Model 55's; a negligible number (e.g., when compared with the huge number of machines placed under copy service in only a few months of 1966) (App. 12a and Pl. Ex. 29).

A sizeable number of 55's have been placed in the Baltimore area (See Pl. Ex. 29). None have been sold (App. 12a, R. 413). Advance discovered Model 55's under copy service plans at eight locations in the Baltimore area (many of which had previously purchased supplies from Advance). SCM's copy service plan completely denied plaintiff the opportunity to compete for this business (App. 12a, 50a).

Based on the evidence that, even after it supposedly made an alternative "available", SCM had sold only an insignificant number of machines, and in the government market (where a rental is supposedly "available", but no 55's have been rented) had used a commission structure which induced its salesmen to push the copy service plan rather than the rental, the court found that SCM's recent Model 55 marketing policies have favored the copy service plan and have continued to foreclose competition for the sale of supplies (R. 414-15).

c. *SCM's Deliberate and Dishonest Misrepresentations.* The District Court and Court of Appeals opinions state that SCM employees "deliberately and dishonestly" blamed machine malfunctions on the use of Nashua paper in an effort to induce the customer by means of such misrepresentation to stop using Nashua paper and to buy SCM paper (App. 12a-13a, 53a-54a, 63a).

Numerous disinterested customer-witnesses appeared at trial and testified that they had been told by SCM that

Nashua supplies would damage their machines (R. 420). SCM's Baltimore branch manager in early 1965 knowingly instructed and encouraged his supply salesmen to disparage Nashua supplies and his successor did the same in 1966 (R. 422). SCM's national sales manager instructed the Baltimore branch manager that customers should be told that Nashua and other competitive supplies caused damage to SCM machines (including the incredible statement that Nashua toner "eats" plastic parts in the machine) (R. 421). SCM also undertook an extensive nationally-based direct-mailing campaign in an effort to convince customers that competitive supplies caused machine problems (R. 426).

SCM developed, fostered and encouraged a campaign of disparagements (App. 12a, 53a, 63a) despite the fact that its own tests showed Nashua to be equal or superior to SCM supplies (R. 365) and despite the fact that its own field reports stated that Nashua produced superior copy quality and had no adverse effects on the machines (R. 428-33).

d. *Deliberate Sabotage of Machines Using Competitive Paper.* The courts found that SCM paper salesmen had deliberately sabotaged machines in which Nashua paper was being used, by setting a shutter so that no satisfactory copy could be produced on any paper, and dishonestly placed the blame for the unsatisfactory copy quality on the Nashua supplies (App. 12a, 13a, 53a). The court found that eleven acts of sabotage were performed by SCM representatives with the purpose of coercing or inducing Advance's customers to purchase supplies from SCM (R. 436, 442, 444, 448, 453, 455, 461, 464). The court also found that, as early as March, 1964, a memorandum, passed between SCM national officials, suggested that maladjustment of the machine shutter could be used to impair the

performance of competitive paper and to "control" a competitor's activities (R. 434).

The court refused to treat the misrepresentations or the sabotage as local Baltimore phenomena. Based on the testimony of out-of-state witnesses the court found that at least some of the problems experienced by Advance in Maryland were also experienced in other sections of the country and were the result of SCM's restrictive practices (R. 468-73).

Purpose and Effect of the Restrictive Practices. The practices were found by the District Court and Court of Appeals to have been implemented for the purpose of restricting competition in the sale of supplies for use in SCM machines: replenisher was restricted to make it impossible for competitive supplies to be sold (App. 8a, 23a); deliberate misrepresentations were made to induce the customer to believe that competitive paper caused machine problems and to cease buying competitive supplies (App. 12a, 22a); sabotage was done to cause the customer to believe that competitive paper would not work in SCM machines (App. 13a); the competitive supplies clauses in Service Agreements were designed and used as a lever to coerce customers to use only SCM supplies (App. 9a-11a, 55a-64a); the sale of repair parts was limited to restrict the ability of competing dealers to offer service when the customer was threatened with the termination of his SCM service agreement (App. 8a-9a); the rental policy was to threaten the termination of the rental when competitive supplies were used (App. 11a, 21a-22a, 52a-55a); the purpose of the restriction of the sale of machines was to prevent competitive dealers from offering to rent machines to customers in order to get the supply business (App. 8a) and the copy service plan for the Model 55 completely foreclosed the sale of competitive

supplies over Model 55 machines (App. 11a-12a, 19a-21a, 48a-52a).

ARGUMENT

1. The Petition for Certiorari is a strange document. In it Petitioner declares:

> "SCM does not seek review of the charges against certain SCM Baltimore employees of 'misrepresentations' or 'threats of cancellation' as found by the court below. Such acts were only relevant to the lower court's conclusion that the service maintenance agreement and the rental agreement for the desk top copiers were, in effect, conditioned on purchase of SCM supplies; and although SCM believes that factual conclusion to have been erroneous, it is not challenged here and, for the purposes of analyzing the legality of those agreements and considering the important questions of antitrust law presented, that factual conclusion has been accepted." (Petition for Certiorari, page 7).

These concessions as to misrepresentations and as to threats of cancellation of rental and service agreements are in addition to the concessions made by SCM in the Court of Appeals with respect to the District Court's findings of "deliberate and dishonest" misrepresentations and sabotage:

> "While the findings of selected instances of 'disparagement' and 'tampering' were made over SCM's objection and its offer of evidence to the contrary and are, we submit, against the weight of the evidence, we do not believe this Court would go to the length of reversing them under the 'clearly erroneous standard' which prevails on appeals in non-jury cases." (Appellant's Reply Brief, p. 2).

Thus, SCM appears in this Court in the posture of not disputing the findings with respect to disparagement,

sabotage, threatened cancellation of service agreements and threatened cancellation of rental agreements upon which the District Court and Court of Appeals founded the lion's share of their damage awards to the plaintiff. (App 25a).

In seeking review SCM declares that its quest for review is founded on its desire to contest the Fourth Circuit's "ruling that SCM's service, maintenance, rental, and copy service agreements were illegal". (Petition for Certiorari, pages 7-8). On this basis the Petitioner asks this Court to take jurisdiction to review the "legality" of the three agreements printed seriatim in its appendix (App. 73a-83a). The difficulties with this prayer are several:

a. Neither the District Court nor the Circuit Court said anything at all to indicate that the rental agreement was illegal standing alone. Their award of damages was limited to damages based on the facts relating to *misuse* of the rental agreement and SCM has conceded such facts on this appeal. The injunction of the District Court did not touch the rental agreement.

b. The District Court likewise held on the basis of facts conceded by SCM for purposes of this appeal, that plaintiff was entitled to damages for *misuse* of the service agreement. The Court of Appeals agreed, but further suggested that the service agreement was illegal *in light of its purposes* since the facts of the case established that it was "adopted and imposed on the customer solely for anti-competitive purposes * * * at the insistence of the Sales Department rather than the Service Department". (App. 58a-59a). The Circuit Court did not require the entry of an injunction against the further use of the service agreement and to date no such injunction has been entered.

c. The lower courts did not declare illegal the copy service agreement printed as Appendix F to the Petition nor did such a nonexistent declaration of illegality result in the "demise by judicial fiat" (Petition, page 12) of "single price packages of related products and services" (Petition, page 9). The District Court merely required, in accordance with long-standing antitrust remedial practices, that the defendant, whose deliberate and dishonest misrepresentations and sabotage are conceded for the purposes of the present Petition, henceforth in its dealings in Maryland, the scene of its depredations, desist from further compulsory tying. The decree expressly provided that SCM "*may* market a copy machine on a copy service basis if at the same time defendant offers said machine to the public on a reasonable rental basis without furnishing supplies, and also offers it for sale at a reasonable price." (Final Judgment, R. 602) (emphasis added).

This Court of course has no way of knowing from the Petition that the District and Circuit Courts did not enjoin further use of the rental, service, and copy service agreements carefully printed in Petitioner's Appendix, for Petitioner has omitted to print the final judgment of the District Court.

Rule 23(1)(j) of the Rules of this Court provides in pertinent part:

> "* * * if the review of the judgment or decree of a federal court is sought, there shall * * * be appended a copy of such judgment or decree, which may however be limited to the portions thereof sought to be reviewed."

Rule 23(4) of the Rules of this Court similarly provides:

> "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of points for considera-

tion may be a sufficient reason for denying his petition."

The omission from the Petition of the Final Judgment of the District Court, and the inclusion in the Petition of three agreements the facial legality of which is in no way at issue clearly transgress the purpose of these rules.

2. The District Court made extensive and indeed voluminous findings of fact and wrote a thorough opinion, as did the Court of Appeals. The two courts were in full agreement as to all of the basic issues of the case save for the single issue whether a service agreement was illegal by reason of the improper purposes for which it was conceived and used (the Court of Appeals' view) or was rather merely illegally put to use (the view of the District Court). The factual findings of the two lower courts, most of which are conceded for purposes of the Petition here, constitute a record of some of the crudest anti-competitive conduct on the part of a major American industrial concern to appear before this or any other appellate court in several decades. Moreover, the record is clear that this conduct originated and was specifically promulgated on the highest levels of the defendant corporation, by the president (R. 379-80), vice president (R. 373, 379-80, 386, and 397) and general sales manager (R. 386, 391, 402 and 421) in various instances. These detailed findings reveal some of what is, in Judge Wyzanski's phrase, the most "dishonestly industrial" conduct imaginable. (*United States v. United Shoe Machinery Corporation*, 110 F. Supp., 341 (D. Mass. 1953), aff'd. 347 U.S. 521 (1954)). Defendant at bottom seeks review not of the judgment, but rather of some strands of reasoning in the Court of Appeals' opinion which it seeks to separate from the record as to the totality of the trade practices employed. Again and again in its

argument, SCM violates the fundamental rule relating to appraisal of the evidence in an anti-trust case that "plaintiffs should be given the full benefit of their proof without entirely compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" (*Continental Ore Company v. Union Carbide & Carbon Corporation*, 370 U.S. 690, 699 (1961)). The limited injunction affecting the copy service program in Maryland and the modest awards of damages are entirely supported by the proof in the record relating to SCM's illegal practices and purposes. It is well settled that "under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown." *Pick Manufacturing Company v. General Motors Corporation*, 299 U.S. 3 (1936). "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration". *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944). See Hart and Wechsler, "Note on the 'Two Court' Rule", *The Federal Courts and the Federal System*, (1953) at 1390-92, and see *Goldman v. United States*, 316 U.S. 129, 135 (1942); *United States v. Johnson*, 319 U.S. 503, 518 (1943); *Delaney v. United States*, 263 U.S. 586, 589 (1924).

3. The points sought to be raised by the Petition, even if viewed in isolation from the total conduct of petitioner, the findings of fact of the trial court below, and the judgment of the court below, are insubstantial. Petitioner would have this Court believe that there is something new about the notion that a seller cannot require the purchase of supplies with a machine where a machine is not separately made available for rental and is made available for sale at a cost unattractive to most potential users of the machine. This Court has long made clear that separate availability of products is not enough if the products in

question are made separately available on sufficiently less favorable terms than the combination package. See *United States v. Paramount*, 334 U.S. 131, 159 (1948); *United States v. Loew's, Inc.*, 371 U.S. 38, 54-55 (1962); *Hazeltine, Inc. v. Zenith Radio Company*, 395 U.S. 100 (1969). In any case, "(t)o ensure * * * that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." *United States v. Loew's, Inc.*, 371 U.S. at 53; *International Salt Co. v. United States*, 332 U.S. 392, 401 (1947). At trial, SCM's own Director of Marketing Research, called as an expert witness by SCM, recognized the developing tendency in corporate financial practices to rent rather than purchase equipment wherever possible (Transcript, 2401).[7] Moreover, the findings of fact of the District Court revealed that the machine in question was not even made available for sale for $4250 until the late spring of 1967, after the institution of plaintiff's lawsuit and after pressure from the General Services Administration; that even after the machines were made available for sale, SCM concealed the availability of the machines on this basis, adopted a commission-rate structure discouraging sale of machines, and advised its salesmen to stress the "advantage of avoiding expenditure for capital investment" (R. 415 and Pl. Ex. S-290a); and that an insignificant number of machines had been sold throughout the nation and as of date of trial none had been sold in Maryland. (R. 408-415).[8] The half million

[7] "(The Court) Is there not a tendency in American business to want to rent everything rather than to buy and amortize?

(The Witness) Yes, it seems to be going in that direction" (Testimony of Robert Sachs, T. 2401).

[8] The trial court expressly found that the Model 55 had *not* been made available on a lease basis (R. 509) and that only 110 such machines had been sold throughout the country by date of trial (R. 514), none in the Baltimore area (R. 514). The number of 55 machines sold represented less than 2% of the number of machines under copy service agreements in 1966 (Pl. Ex. 29).

dollars worth of sales of machines claimed by SCM (Petition, page 11) represents barely a hundred such machines throughout the United States.

Similarly insubstantial are the arguments advanced by SCM with respect to the application of the *Fortner* doctrine to the service, the copy service and the rental agreements.

The Petitioner complains that the Circuit Court concluded that it could assume economic power from the mere "imposition of a tie-in arrangement on a substantial amount of commerce" (Petition for Certiorari, page 15). It is clear that in so holding with respect to copy service and rental agreements the Circuit Court stood on firmly established ground even before this Court's recent decision in *Fortner*. See *Northern Pacific Railway v. U. S.*, 356 U.S. 1 (1958); *Times-Picayune Publishing Company v. U. S.*, 345 U.S. 594, 608-09 (1953). It is further clear that the Petition caricatures the Circuit Court's opinion which expressly recognized that "*Fortner* suggests that even where an appreciable number of buyers are involved the effectiveness of a tie-in may not always show a seller's economic power because it is possible that some tie-ins serve 'legitimate business purposes' 394 U.S. at 506" (App. 62a). The Circuit Court was at pains to demonstrate that no legitimate purpose was served by the tie-in here and that a substantial percentage of SCM machine owners and lessees in the Baltimore area had entered into service maintenance contracts imposing the tying condition (App. 62a-64a). The Circuit Court further stressed that "the District Court's well supported, extensive and clear-cut findings of sabotage, misrepresentations and threats of cancellation underline the fact that the clause in the service contract was an integral part of the pattern of anti-competitive behavior" (App. 63a-64a). In stressing the number of customers affected by the tie-in the Circuit Court properly alluded

to the statement in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962):

> "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

It is clear that the Circuit Court carefully and correctly applied the law as set forth in *Fortner* and other applicable decisions of this Court.

However, for present purposes it is not necessary to consider the correctness of the Fourth Circuit's view of the law, for the District Court in reaching its conclusions as to illegality relied not only on evidence of customer acceptance of tying conditions but also on the "uniqueness in attributes" of the tying products and services in finding that SCM had sufficient economic power to use its service agreements, rental agreements and machines as tying products. The District Court noted in its opinion "once a customer has purchased or rented an SCM copying machine, he is usually interested in obtaining service from 'factory-trained personnel'; * * * if he is renting the machine, having selected it in preference to other machines, he is usually interested in continuing the rental agreement" (App. 60a). Further, in its findings of fact the Court made numerous findings relating to the unique attributes of the tying products and services. The District Court found that the machines were manufactured under patent license (R. 499) that they were distributed through an unusually wide distributional system (R. 507) that defendant's market share in the direct electrostatic machine market was approximately 37% in 1964 and approximately 13% in 1967 (App. 44a-45a), larger than the 10% market share of gasoline found sufficient in *Osborn v. Sinclair Refining Company*, 286 F. 2d 832, 835, 841 (4th Cir. 1960) cert. denied 366 U.S. 963 (1961); that availability of factory service,

including preventive maintenance, was of great importance to machine owners (R. 397-407); and that the machines of different manufacturers are distinctive and "have various advantages and disadvantages" (App. 5a, R. 477 and Defts. Ex. 39), not being as fungible as sacks of flour, as Petitioner asserts (Petition, p. 15).

At bottom Petitioners have undertaken to seek review of fragments of an opinion rendered by the Fourth Circuit rather than of the judgments rendered by the District Court and the Fourth Circuit. Even if Petitioner's view of the law relating to tie-ins is correct it is clear that Petitioner would not be entitled to reversal in light of the findings of fact of the District Court which amply support the District Court's conclusions relating to the wrongful acts of defendant, its purposes, the sufficiency of the economic power of the defendant and the distinctiveness of its products and services. The propositions advanced by Petitioner are entirely academic in light of the factual record below and Respondent here should not be required in light of the oppression to which it has concededly been subjected by Petitioner to engage in further litigation over fragments of language which cannot alter any portion of the judgments rendered below.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

FINAL JUDGMENT

In the United States District Court
For the District of Maryland

[Same Title]

This cause having come on for trial before this Court, sitting without a jury; and testimony having been taken and all parties having been given an opportunity to be heard on oral argument and written briefs, it is now, therefore, in accordance with the Court's Opinion and Findings of Fact which have been duly filed herein,

ORDERED, ADJUDGED AND DECREED as follows:

1. Defendant is enjoined and restrained against deliberate misrepresentations by its agents and employees attributing the cause of malfunctioning of SCM copying machines to Nashua supplies or other competitive supplies sold or offered for sale by plaintiff in an effort to prevent plaintiff's customers or other users of SCM machines in plaintiff's marketing area from using such competitive supplies.

2. Defendant is enjoined and restrained from distributing its Model 55 copying machine or any other copying machine in Maryland (a) on a copy service basis, that is, a marketing plan under which the customer pays defendant a prescribed charge based on the number of copies made and defendant furnishes the copying machine, supplies and service, or (b) on any other basis which requires that the customer buy or use defendant's supplies; provided, however, that defendant may market a copying

machine on a copy service basis if at the same time defendant offers said machine to the public on a reasonable rental basis without furnishing supplies, and also offers it for sale at a reasonable price. This paragraph shall be effective October 1, 1968. Defendant is ordered and directed to file on or before October 1, 1968, an affidavit of service upon all present holders of copy service agreements in Maryland of the immediate availability of an agreement for the rental of the machine on a reasonable rental basis without furnishing supplies.

3. Whenever defendant offers a copying machine on a copy service basis or other basis requiring the purchase of defendant's supplies, defendant shall also inform the prospective customers in one way or another of the availability of the machine for sale and on a reasonable rental basis without furnishing supplies.

4. The provisions of this judgment shall apply to the defendant SCM Corporation, to each of its officers, directors, agents, employees, subsidiaries, successors and assigns, who shall have received notice of this judgment by personal service or otherwise. Defendant is ordered and directed to serve a copy of this judgment upon (a) each member of its Board of Directors, (b) each of its Vice Presidents and chief managerial officers who are not members of its Board of Directors, and (c) each present employee engaging in direct sales of SCM copying machines or supplies to consumers, or engaged in the servicing of said machines in Maryland. Defendant is directed within 30 days after the effective date of this judgment to file with this Court and serve upon the plaintiff an affidavit as to the fact and manner of its compliance with this section of the decree.

5. Plaintiff is entitled to recover from defendant damages of $16,714, trebled as provided by law, making the total amount of the award $50,142.

6. Plaintiff is entitled to recover from defendant the sum of $35,875 as attorneys' fees, and its taxable costs in the amount of $4,910.61.

7. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the enforcement of compliance therewith, and for the punishment of violations of any of the provisions contained herein.

8. The claims of plaintiff and the claims of defendant are in all other respects dismissed.

ROSZEL C. THOMSEN,

Chief Judge, U.S. District Court

July 11, 1968.

In The United States District Court
For the District of Maryland

(Caption Omitted)

[SUPPLEMENTAL] FINAL JUDGMENT

The Court having considered the matters set forth in the Stipulation of Settlement filed by the parties herein, and having approved the Stipulation of Settlement, it is this 2nd day of January, 1970, ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is entitled to recover from the defendant, in addition to the damages set forth in the judgment entered herein on July 11, 1968, additional damages in the amount of $6,550, trebled as provided by law, making the total amount of the additional award $19,650.

2. Plaintiff is entitled to recover from the defendant, in addition to the counsel fees set forth in the judgment entered herein on July 11, 1968, additional counsel fees in the amount of $5,000.

3. Interest on this judgment shall be computed from the date of entry hereof.

ROSZEL C. THOMSEN,

Chief Judge.